No. 80-1568

In the Supreme Court of the United States

October Term, 1980

PADUCAH ASSOCIATES, LTD.,
Petitioner,

vs.

INDIANA INSURANCE COMPANY

and

ALL PRIDE DEVELOPMENT CORPORATION,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

INTRODUCTION 1

THE PETITION FOR A WRIT OF CERTIORARI FULLY SUPPORTS THE GRANTNG OF SUCH WRIT 2

1. The Decision of the District Court and the Court of Appeals Conflicts With *Lundgren v. Freeman,* 307 F.2d 104 (9th Cir. 1962) 2
2. The Respondent's Argument, Taken to Its Logical Conclusion, Would Deny the Petitioner Due Process 3
3. The District Court in Southern Ohio Decided That Paducah Did Not Waive Its Slander of Title Action 4

CONCLUSION 5

Table of Authorities

Lundgren v. Freeman, 307 F.2d 104 (9th Cir. 1962) 2, 3

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INTRODUCTION

The Respondent's brief in opposition to the pending petition for a Writ of Certiorari to the United States Court of Appeals not only highlights the problems which have led the Petitioner to seek this Writ, but also contains illogical and inaccurate statements to which this Court's attention should be drawn. Accordingly, this Reply on behalf of the Petitioner is necessary.

THE PETITION FOR A WRIT OF CERTIORARI FULLY SUPPORTS THE GRANTING OF SUCH WRIT

1. The Decision of the District Court and the Court of Appeals Conflicts With *Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962).

The Respondents would have this Court believe that there is no conflict between the *Lundgren* case and the case at bar because in *Lundgren* the arbitrators stated in the award that they were reserving certain questions for subsequent litigation and in the case at bar the arbitrators stated that they were "specifically excluding the slander of title issue from . . . consideration. . . ." (*see*, Appendix C, p. A23 of Petition for a Writ of Certiorari filed herein). Clearly, this is a false difference which the Respondents raise.

The Respondents admit, at page 5 of their brief, that *Lundgren* holds that arbitrators may reserve certain questions from their decision for future resolution by a court. The United States District Court for the Western District of Kentucky held, and the Court of Appeals affirmed, that such a reservation is not proper and that any issue so reserved is thereafter waived. Specifically, at Appendix B, page A7, the District Court clearly shows that it recognized that the Petitioner's slander of title issue was presented to and discussed by the arbitrators prior to the drawing of the formal submission of issues. The only logical reason that the Petitioner's slander of title issue was not formally submitted to the arbitration panel is that the arbitrators had already considered accepting this issue and decided to reserve it for subsequent litigation. The District Court, therefore, erroneously found that the slander of title issue had never been submitted to the arbitration panel when the

only logical conclusion which can be drawn from the facts is that it was submitted, discussed and reserved for litigation prior to the time the undated Second Stipulation, upon which the Court relied in finding waiver, was drawn.

It must also be noted that the District Court considered and erroneously rejected the reservation of issues holding of the *Lundgren* case. *See,* Appendix B, page A9. Accordingly, the decision in the case at bar conflicts with the *Lundgren* case and its holding that arbitrators may reserve issues offered to them for resolution in subsequent litigation.

2. The Respondent's Argument, Taken to Its Logical Conclusion, Would Deny the Petitioner Due Process.

The Respondents argue that the Petitioner waived its right to arbitration by filing its Supplemental Complaint in the District Court. Respondents' brief, p. 6. However, the District Court held that it could not determine the slander of title issue because the parties had agreed to arbitrate and such agreement bars future claims. Appendix B, pp. A8-A9. This is a circular argument which leaves the Petitioner without a day in court.

The facts clearly show, and the District Court recognized, that the slander of title issue was discussed by the arbitrators and intentionally not decided by them. Appendix B, p. A7. To now say that the Petitioner is not entitled to have its claim heard by the District Court because it agreed to arbitrate and that it can not arbitrate because it filed its claim in court pursuant to the arbitrators' reservation of the claim for subsequent judicial resolution, is to argue for a true "Catch-22" rule of law.

3. The District Court in Southern Ohio Decided That Paducah Did Not Waive Its Slander of Title Action.

The Respondents contend that they did not argue or litigate the defense of failure to arbitrate before the United States District Court for the Southern District of Ohio. Respondents' Brief, page 7. They further contend that the Southern Ohio Court merely found that Paragraph 7 of the arbitration award is not manifestly in disregard of the law or lacks fundamental rationality. Respondents' Brief, page 3.

This argument overlooks the fact that the District Court in Ohio necessarily determined that there had been no waiver of the slander of title action by Paducah in order to reach the conclusion that Paragraph 7 was not in manifest disregard of law and was fundamentally rational. Accordingly, the District Court awarded the Petitioner summary judgment as to the Respondents' Counterclaim which the Respondents had based upon the failure to arbitrate argument. *See,* Appendix C, pages A21-A24. The District Court in Ohio recognized what the District Court in Kentucky did not: That the parties to arbitration may agree to reserve, or the arbitrators on their own may reserve, issues for later determination by a court, despite a prior *agreement* to arbitrate.

CONCLUSION

WHEREFORE, the Petitioner respectfully urges the Court to grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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